9950

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 100.

DANIEL CRONIN, PLAINTIFF IN ERROR,

v.

FRANK ADAMS, JOHN T. BOTTOM AND WILLIAM H. GRIFFITH, CONSTITUTING THE FIRE AND POLICE BOARD OF THE CITY OF DENVER, AND HAMILTON ARMSTRONG, CHIEF OF POLICE OF THE CITY OF DENVER, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

Section 20 of the charter of the city of Denver defines the powers of the city council and, in part, reads as follows:

> "Except as otherwise provided in this act, the city council shall have the management and control of the city finances, and all property of the corporation, real, personal and mixed, and power by ordinance: * * * Exclusively to provide for the licensing, taxing and regulating of tippling houses, dram shops,

billiard tables and bowling alleys; and the selling or giving away of any intoxicating or malt liquors by any person within the city, and to tax and regulate the same; provided, * * *.

"5th. That no liquor saloon, dram shop or tippling house shall have or keep in connection with or as part of such saloon, tippling house or dram shop, any wine room or other place, either with or without doors, curtain or curtains, or screen of any kind, into which any female person shall be permitted to enter from the outside, or from such tippling house or dram shop, and there be supplied with any kind of liquor whatsoever."

In pursuance of the authority by said section of the charter conferred, the council of the city of Denver enacted an ordinance known as ordinance No. 101 of the series of 1898, which may be found in the Compiled Ordinances of the city of Denver, from section 733 to section 763, inclusive. Section 745 thereof is as follows:

"Each and every liquor saloon, dram shop or tippling house keeper, licensed under the provisions of this article, who shall, by himself or his agent, clerk or servant, permit any gambling or riotous or disorderly, indecent or offensive conduct in or about his place of business or premises, or who shall have or keep in connection with or as part of such liquor saloon, dram shop or tippling house, any wine room or other place, either with or without door or doors, curtain or curtains, or screen of any kind, into which any female person shall be permitted to enter from the outside, or from such liquor saloon, dram shop or tippling house, and there be supplied with any kind of liquor whatsoever, shall, upon conviction, be fined as hereinafter provided."

Section 746 is as follows:

"No person, whether as principal, clerk, agent or servant, having charge or control of any liquor saloon,

dram shop or tippling house, or place where intoxicating or malt liquors are sold or given away, or any place adjacent thereto, or connected therewith in any manner whatsoever, either by doors or otherwise, shall suffer or permit any female person to be or remain in such liquor saloon, dram shop, tippling house, or other place where intoxicating or malt liquors are sold or given away, for the purpose of there being supplied with any kind of liquor whatsoever. No person owning or having charge or control of any liquor saloon, dram shop or tippling house shall employ or procure, or cause to be employed or procured, any female person to wait or in any manner attend on any person in any dram shop, tippling house or liquor saloon, or in any place adjacent thereto or connected therewith, where intoxicating or malt liquors are sold or given away, nor shall any female person be or remain in any dram shop, tippling house, liquor saloon or place adjacent thereto or connected therewith, and wait or attend on any person, or solicit drinks in any such place."

The plaintiff in error filed his bill of complaint in the district court of Arapahoe county, Colorado, from which it apears that he is a saloonkeeper in the city of Denver, engaged in the business of retailing liquors under, and by virtue of, a license issued by the said city. The plaintiff says he has violated said ordinance, and has been prosecuted therefor. By his bill he sought an injunction restraining the defendants from further prosecuting him for any continued violation thereof.

The basis of his complaint is that said laws are in violation of the state and federal constitutions, because of the limitation placed upon his power to sell and serve intoxicating liquors to women, either in his saloon or in rooms connected therewith or adjacent thereto. The defendants filed a demurrer to the bill of complaint, which was overruled, and, electing to stand thereon, final judg-

ment was rendered against them, making perpetual a temporary injunction theretofore granted in favor of the plaintiff. The defendants appealed to the supreme court of the state of Colorado, where said cause was heard, and, in an opinion of the court, delivered by Chief Justice Campbell, and reported in 29 Colo., 488, the judgment of the lower court was reversed—the supreme court holding that said laws were not in violation either of state or federal limitations. From the judgment of the supreme court of the state of Colorado said action has been brought into this court by writ of error. Plaintiff concedes that the ordinance is authorized by the charter, but contends that both are in violation of the state and federal constitutions, and particularly that they are in conflict with the fourteenth amendment to the constitution of the United States, which is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make, or enforce, any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

All of the plaintiff's assignments of error are comprehended within and may be discussed under his contention that the sections of the ordinance above set forth and the statute authorizing the same are in violation of the constitution of Colorado and the constitution of the United States.

ARGUMENT.

I.

THE STATUTE AND ORDINANCE WHOSE VALIDITY IS HERE ATTACKED HAVE BEEN UPHELD BY THE SUPREME COURT OF THE STATE OF COLORADO, WHOSE RULING IS FINAL SO FAR AS THE STATE CONSTITUTION AND LAWS ARE INVOLVED.

No argument or citation of authority is necessary to support the rule above announced, and reference thereto is made only for the purpose of brushing aside all questions save the contention that the state statute and the city ordinance enacted in pursuance thereof are in conflict with the constitution of the United States. This well known rule of law most effectually answers all that counsel has to say with respect to the provision of the Colorado state constitution bestowing the right of suffrage on the women of that state.

II.

THE CHARTER PROVISION AND THE ORDINANCE IN QUESTION ARE A VALID EXERCISE OF THE POLICE POWER OF THE STATE OF COLORADO AND ARE OBNOXIOUS TO NO FEDERAL LIMITATION.

The free and unrestrained sale of intoxicating liquors has a disastrous effect, both upon the public health and public morals. This fact is so well recognized both by courts and publicists, that argument or elaboration seems to be wholly unnecessary.

If this is true, it follows that it lies within the police power of the states to regulate the sale of intoxicating liquors in such manner and upon such terms and condi-

tions as, to the legislatures, may seem meet and proper. It is true that no legislative act may contravene the federal laws or the federal constitution, but to the states has been reserved the right to regulate and control, within their respective boundaries, and in their own discretion, every trade or business which affects the public health, public safety, or public morals.

In Boston Beer Co. v. Mass., 97 U. S., page 25, this court, speaking through Mr. Justice Bradley, said:

> "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature can not, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

The matters subject to such state control are almost infinite in number, as well as diversified in character. Black, in his work on Intoxicating Liquors, at section 26, says:

> "And first, in relation to the public safety. It is on this ground that courts have sustained the validity of laws regulating the grade of railways and prescribing how and upon what grade their tracks shall cross each other; of laws regulating the speed of trains at highway and other crossings; of regulations requiring railroads to ring the bell or blow the whistle of their locomotives immediately before passing grade cross-

ings or other dangerous places; of statutes or ordinances establishing fire limits in cities; of laws to prohibit the keeping of gunpowder in unsafe quantities in cities and villages; and of many other similar enactments. Next as to the protection and preservation of the public health. In this connection we may cite the case of Taunton v. Taylor, in which it was held that a statute giving to a board of health the power to forbid the exercise within the limits of a city of any trade which was a nuisance or hurtful to the inhabitants, or dangerous to the health of the community, or attended by noisome or injurious odors, was valid and constitutional. So it is fully within the power of the legislature to regulate the business of slaughtering cattle in populous towns, by limiting its prosecution to particular localities or quarters therein. And on the same principle, the laws passed in many of the states, to prohibit or regulate the manufacture and sale of 'Oleomargarine,' or other imitations of butter or fraudulent substitutes for it, were universally held valid and constitutional, as legitimate exertions of the police power of the state. Finally, although the state may not assume to be the guardian of morals, it can not be doubted that it has the power to enact measures calculated for the repression of such forms of vice as threaten its welfare by generating disease, pauperism and crime. This is signally true of the unrestricted traffic in intoxicating liquors, and of the offense of maintaining brothels, publishing or selling obscene books or prints, keeping gaming tables, and the like."

It has been held that lotteries are the proper subjects for the exercise of the police powers of the state.

Stone v. The State of Miss., 101 U. S., page 814.

In New Orleans Gas Light Co. v. Louisiana Light & Heat Producing and Mfg. Co., 115 U. S., page 650, Mr. Justice Harlan used the following language:

"The constitutional prohibitions upon state laws impairing obligations of contracts does not restrict

the power of the state to protect the public health, public morals or public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with the state are subject to regulations for the protection of the public health, the public morals and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

Upon this principle a city council may prescribe the limits of the city within which laundries and wash houses shall not be operated, for certain hours of the night, without in anywise infringing the constitutional rights of the proprietors thereof. Barbier v. Connelly, 113 U. S., 27. A legislative restriction designed for the protection of the public health, with respect to the sale of cigarettes to young persons, has been held by this court to be within the police power of the state.

Austin v. State of Tenn., 179 U. S., 343.

A statute which limits the period which workmen shall be required to labor each day in mines or in smelters for the reduction or refining of ores or metals, to eight hours per day, is held, in Holden v. Hardy, 169 U. S., 366, to be a legitimate exercise of the police power of the state.

L'Hote v. The City of New Orleans, 177 U. S., 588, holds an ordinance to be valid, within the police power of the state, which seeks to regulate the location, within certain limits of the city, of houses occupied by women of lewd character.

Examples might be multiplied, for, as said by this court, in L. & N. R. R. Co. v. Kentucky, 161 U. S., 677, "Whatever is contrary to the public policy or inimical to the public interests is subject to the police power of the state, and within legislative control, and in the exercise

of such power the legislature is vested with a large discretion which, if exercised *bona fide*, for the protection of the public, is beyond the reach of judicial inquiry;" or, as stated in Camfield v. United States, 167 U. S., 518, "the police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public interests."

It is upon the principle advanced in the cases mentioned that it is held that the states may control and regulate the sale of ardent spirits within their respective boundaries.

Black on Intoxicating Liquors, at section 37, uses the following language:

> "It is within the power of the state to absolutely *prohibit* the manufacture and sale, within its borders, of intoxicating liquors, either by statute or constitutional enactment, and such prohibition is a lawful exercise of its police power, and is not open to objection on constitutional grounds."

The author cites a multitude of cases from both state and federal courts in support of the doctrine announced. Again, the same author, at section 39, says:

> "If the power of the state to prohibit the manufacture and sale of intoxicating liquors be conceded,—and it is no longer open to question,—it will follow inevitably that the power of the state to *regulate* the sale of such articles, and to impose conditions and burdens and responsibilities upon those who desire to engage in the traffic, is practically unlimited. This principle, which is recognized by the authorities as a necessary truth, will furnish a test for determining the validity of many of the laws which have been enacted by way of restriction upon the liquor traffic, and will show the necessity of pointing to a very clear infraction of some constitutional guaranty, in order, successfully, to controvert the validity of such a statute. And,

we may here remark, that if the state has power to prohibit the sale of liquor, it has also power to prohibit the *giving* of liquor by one person to another. The evil to be avoided is the communication from one to another of an article which may be injurious to the recipient, or which, by its general use, may demoralize or harm the whole community. It is not attempted to restrain a man's private indulgence in drink. But that is because law deals not with the isolated individual, but with men in their relation to each other. Upon the delivery of the noxious substance from one to another, a relation is established, of which the law may take cognizance. And it is perfectly immaterial whether the transfer be by sale, barter or gift. The evil is not in the receipt of money for the article furnished, but in the furnishing of it."

In Schwuchow v. The City of Chicago, 68 Ill., 444, the power of the state to regulate the sale of intoxicating liquors was under consideration, and the following language, beginning at page 448, is used:

"We presume no one would have the hardihood to contend that the retail sale of intoxicating drinks does not tend, in a large degree, to demoralize the community, to foster vice, produce crime and beggary, want and misery. And, if such is the tedency, it should not have unrestrained licenses to produce these results. If sanctioned at all, it should be under restraints that will suppress, or at least mitigate, such evils to society. From an early period in civilization, in all countries, the unrestricted sale of such drinks has been regarded as pernicious. Hence, as it is believed, in the code of laws in every civilized state, it has, at all times, been regulated and put under restraint. In this respect it has formed an exception to other legitimate business, and it is believed to have resulted from humane feelings and a desire to suppress immorality, vice, crime and disorder, and the other miseries that follow in its train."

Chief Justice Fuller, delivering the opinion of this court in Giozza v. Tiernan, 148 U. S., 655, uses the following language, at page 661:

> "The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship.
>
> Bartemeyer v. Iowa, 18 Wallace, 129."

Referring to the fourteenth amendment, he continues:

> "The amendment does not take from the states those powers of police that were reserved at the time the original constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order."

In the License Cases, 5 Howard, Chief Justice Taney said:

> "If any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice and debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

Mr. Justice McLean, delivering a separate opinion in the same cases, says:

> "A state regulates its domestic commerce, contracts, the transmission of estates, real and personal,

and acts upon internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power * * *. The acknowledged police power of a state extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or the morals of the community may be removed."

In same case, Mr. Justice Woodbury, referring to the states, used the following language:

"How can they be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when and where it shall be conducted in articles intimately connected either with public morals or public safety or public prosperity?"

Mr. Justice Grier, in his short but vigorous opinion therein, among other things, said:

"I take this occasion, however, to remark that the true question presented by these cases, and one which I am not disposed to evade, is whether the states have the right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects and the cause of disease, pauperism and crime. * * * Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health and morals, must come within this category. As subjects of legislation, they are, from their very nature, of primary importance; they lie at the foundation of social existence; they are for the protection of health and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience or luxury, to recede when they come in conflict or collision. * * * "It is not necessary for the sake of justifying the state legislation now under considera-

tion to array the appalling statistics of misery, pauperism, and crime, which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the states and the United States; each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousand fold in the health, wealth and happiness of the people."

In Mugler v. Kansas, 123 U. S., 623, the prohibition law of the state of Kansas is upheld. In Crowley v. Christensen, 137 U. S., 86, Mr. Justice Field, delivering the opinion of the court, said:

"It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons as are of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restriction under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. * * * All of this is but common knowledge and would hardly be mentioned were it not for the position often taken, and vehemently pressed, that there is something wrong in principle and objectionable in similar restrictions when applied to the business of selling by retail, in small quantities, spirituous and intoxicating liquors. It is urged, that, as the liquors are used as a beverage,

and the injury following them, if taken in excess, is voluntarily inflicted and is confined to the party offending, their sale should be without restriction, the contention being, that what a man shall drink, equally with what he shall eat, is not properly matter for legislation. There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop where intoxicating liquors in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. * * * The sale of such liquors in this way has, therefore, been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of a saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week, on which the saloon may be open. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the state is fully competent to regulate the business—to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of a state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already stated, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rests in

the discretion of the governing authority. That authority may vest in such officers as it may deem proper, the power of passing upon applications for permission to carry it on, and to issue license for that purpose. It is a matter of legislative will only. As in many other cases the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the state, or one which can be brought under the cognizance of the courts of the United States."

From the principle announced in the above authorities it follows that no citizen has an inherent or indefeasible right either to buy or sell intoxicating liquors. As shown above, the sale and purchase may be absolutely prohibited. The right to sell, therefore, is a favor conferred. The business of the saloon keeper is thus placed in a class wholly different and distinguishable from the vocation of a man engaged in a business which in no wise affects or impairs the public health, the public morals or the public safety. No one in the city of Denver may sell intoxicating liquors without a license. Inferentially, the plaintiff shows that he has a license from the city. He does not, however, bring his license, or a copy thereof, into court. The presumption is that any license issued to him is in conformity to law. Certainly the city authorities can issue no license in conflict therewith. A license which purports to authorize him to sell liquors in violation of law would be void and would confer no authority at all. The strongest position, therefore, which the plaintiff can take in this case is, that he has a license to sell intoxicating liquors, but that said license is subject to all of the restrictions contained in the provisions of the charter and ordinance above set forth. By virtue of his license he has acquired the right to sell as therein authorized. He thus has a special privilege conferred upon him, which other

citizens do not have. These privileges were acquired either as an absolute matter of grace or for a consideration given. Whether they be regarded as a mere favor conferred or as temporary rights acquired for a consideration paid, the plaintiff is in no position to complain because those rights may be hedged in by limitations and restrictions. In either event he secured all or more than he had any right to demand. He secured everything to which he was entitled, and he can not now complain because his financial interests might be enhanced if the city had given him other rights or different rights than those for which he paid, or than those which the city may have voluntarily bestowed upon him. The plaintiff may no more complain because of the limitations fixed by law and embodied in his license than may a corporation complain because its powers are limited to those contained in its charter.

As above stated, the state of Colorado has the right, and, under the charter, the city of Denver has the right, absolutely, to prohibit the sale of intoxicating liquors within said city. From this proposition, which can not be disputed, it inevitably follows, just as the whole includes the parts, that the sale thereof may be partially prohibited. The right to prohibit the sale to all necessarily includes the right to prohibit the sale to some. It is a matter wholly within the discretion of the state and the city. The state in its own wisdom may wipe the traffic out entirely by prohibiting the sale to all, or it may lessen the evil by designating those most likely to be injured by its use and prohibiting its sale to them.

Counsel's argument that plaintiff has a license to sell intoxicating liquors, and that, therefore, his business is placed in the same class with any other legitimate trade is fallacious, in that it overlooks the fact that said business is lawful only to the extent that the license makes it so. But for the license he could not sell at all. With the

license, it is lawful for him to sell as therein provided, but not otherwise. He has no license to sell intoxicating liquors to women in his saloon. It is, therefore, as unlawful for him to sell to women at said place as if he had no license at all.

An argument similar to that presented by counsel for plaintiff was effectually answered by Chief Justice Dixon, in State v. Luddington, 33 Wis., 107, in the following language:

> "And herein, as this court conceives, consists the chief defect and fallacy of the position assumed and argued with so much ingenuity and research by the learned counsel for the respondent. They forget, as it appears to us, that the subject with which we are dealing is not one of those pertaining to the primary and fundamental rights of the citizen, and as to which no unlimited control has been vested in the legislature. They seem to overlook this principal ground of distinction, and argue as if the action of the legislature was an infringement of the natural and inalienable rights of the citizen, declared and guaranteed by the constitution, instead of the exercise of a discretionary power against which no limit has been set by that instrument. And this, we think, is the very turning point of the controversy, namely, that the legislature may grant or withhold authority to sell at its pleasure, and, granting such authority, it is held by the licensee at the mere pleasure or grace of the body granting it. It is held by him, not as a matter of primary and absolute right, but as a favor, which, like all favors, must be received upon such terms and conditions, and subject to such burdens and inconveniences, as the donor thinks proper to impose, and the donee elects to accept."

Not only is the plaintiff prohibited from selling or serving liquors to women in his saloon or in rooms adjacent thereto, but he is also forbidden to employ female persons to wait on or attend on any person in his saloon

or in rooms connected therewith where liquors are being sold or given away; and finally, women themselves are forbidden to be in said place for said purposes. We submit that these restrictions are in perfect accord with the principle repeatedly announced by this court.

Laws prohibiting the gift or sale of intoxicating liquors to minors, inebriates and drunken persons, and like characters, have uniformly been upheld as being a proper exercise of the police power of the states, in the interest of the public morals. If this is true with respect to the persons of the character named, surely it requires no argument to show that the public morals require such restrictions with regard to women; and especially with regard to the sale or gift of intoxicating liquors to them in public saloons, or private apartments connected therewith, where both sexes would most likely be brought together in drunken carousals, and where the court knows no woman of good character would be found, for the purpose of being served with intoxicating liquors.

The plaintiff's statements, in his bill of complaint, with regard to the opportunity to enhance his financial interest, if permitted to make sales of intoxicating liquors, at his saloon, to women, only emphasize the wisdom of the law-making power of the state of Colorado and the city of Denver in enacting the laws in question. Speaking of this particular ordinance, Judge Wilson, in Denver v. Domedian, 15 Colo. App., 36, says:

> "We agree that the ordinance is a good one; that its objects are most praiseworthy, and that its rigid enforcement would meet with the approval of every good citizen."

Black on Intoxicating Liquors, at section 42, uses the following language:

> "Wherever the law allows the sale of liquor under license or other restrictions, there are statutes forbid-

ding such sale to certain classes of persons who are peculiarly liable to be injured or demoralized by indulgence in alcoholic beverages, such an minors, persons already intoxicated, and habitual drunkards. The constitutionality of such laws has seldom been questioned, and indeed their validity could scarcely be assailed with any show of reason. What authority we have is in affirmance of the legislative power to ordain such regulations. And it is held that a law against permitting a minor to enter upon and remain in a retail liquor dealer's place of business is valid. It is enacted for the purpose of shielding youth from temptation, and the state has power to enact and enforce such a law, even in disregard of the parents' wishes, when its object and tendency is to protect a child."

In Foster v. Police Commissioners, 102 Cal., it appears that an ordinance prohibited the issuance of a license to any person to sell intoxicating liquors who carries on business, or is about to carry on business where females are suffered or procured to wait on or attend in any manner on any person. It was shown that the appellant, in the past, had employed females to wait upon his customers in his place of business. He protested that he would not employ females in the future if his application for a license was granted. The license was refused, and he petitioned the superior court for a writ of mandate to compel the board of police commissioners to consent to the issuance of the license to him as a retail liquor dealer. The writ was denied. Discussing this question, at page 491, the court says:

"His protestation that he did not intend, and would not in the future, procure or permit females to wait upon his customers does not aid him. A man who has in the past shown himself willing to debauch the morals of the community to increase his business would not in the future refrain from any line of conduct in the prosecution of his business which would

not bring upon himself personally the penalty of the law, whatever of evil it might bring to others. The ordinance was, therefore, not only constitutional, but wise, and should be followed scrupulously by those entrusted with its execution."

A similar question was raised in ex parte Hays, 98 Cal., 556, where it was claimed that an ordinance, in prohibiting a license to be issued to any person for the purpose of engaging in the business of retailing liquors where females were employed as waitresses, was a discrimination again women, in violation of section 18 of article XX of the constitution of California, which declares that no person, on account of sex, shall be disqualified from entering upon or pursuing any lawful business, vocation or profession. The court said:

> "This section does not, in our opinion, operate as a limitation upon the power of the state or its municipalities to prescribe the conditions upon which the business of retailing intoxicating liquors shall be permitted to be carried on, or in regulating the manner in which such business shall be conducted."

In Bergman v. Cleveland, 39 Ohio St., 651, an ordinance of the city of Cleveland was attacked as being in violation of the state and federal constitutions, because a saloon keeper was not permitted to employ any girl or girls, woman or women, other than the wife of the proprietor, to wait on customers or to serve them with intoxicating liquors. The court, in answer, said:

> "It is urged that the ordinance violates article I, section 1, of the constitution of the state, the fourteenth amendment of the constitution of the United States, and other provisions of the state and federal constitutions. But we do not think so. The power to *regulate* such places where intoxicating liquors are sold is expressly delegated to incorporated cities and

villages, and in our opinion the ordinance and conviction are within the power so delegated, and violate no constitutional provision."

In Blair v. Kilpatrick, 40 Ind., 312, a law, authorizing the issuing of a license to "white male inhabitants" only, was attacked as being repugnant to the constitution of Indiana, on the ground of discrimination against colored persons and women. The court said:

> "It is, however, conceded that the civil rights bill may have had the effect to strike out the word 'white' from the act. Still it is claimed, as females are citizens, and are excluded by the act from its privileges and immunities, the whole act is void. While we recognize females as falling under the head of citizens, we do not think that the right to engage in the business of retailing intoxicating liquors is one of the rights contemplated in the section of the bill of rights which we have copied."

The supreme court of Montana, in State v. Reynolds, 14 Mont., 383, had under consideration a statute forbidding the sale of spirituous liquors in any place where women or minors are employed. Discussing this question, the court said:

> "There appears to be wisdom and propriety in this provision as a police regulation, and we fail to find in it the infringement of any provision of our constitution. The California court, in cases cited on this point, had under consideration constitutional provisions, which are not found in the constitution of this state, and which also appear to have been greatly modified by revision of the California constitution since the cases relied on were decided."

By an act of the legislature of the state of Washington, it was provided that no female person should be employed in any capacity in any saloon or other place where intoxi-

cating liquors were sold; and in the case of State v. Considine, 16 Washington, 358, the validity of this statute was brought in question by Considine, who was convicted for violating said act. The court said:

> "Defendant contends that a female is a citizen, and that her liberty to contract is abridged by the statute, and argues that, before the law, her right to choice of vocations can not be denied on account of sex. But that liberty to contract was always limited to lawful contracts is elementary law, and the courts have followed it from time immemorial, and contracts against public policy or good morals can not be enforced, and it was always competent for the legislative powers to prohibit acts under them by attaching a penalty. * * * The statute in question is evidently intended by the legislature for the maintenance of good morals and in preventing a nuisance. The legislature is the supreme authority, within constitutional limitations, to determine what is and what is not an immoral business or a nuisance; and, when it has so determined, its enactment is valid, unless the legislative act is clearly partial, arbitrary, and oppressive. The prohibition of employment of a female person in the statute under which defendant was convicted uniformly applies to all persons employing, and who are engaged in a like business with defendant, and extends to all female persons employed. After the enactment of the law of March 19, 1895, it became a part of the 'law of the land,' and the defendant was properly convicted of its violation."

After judgment was affirmed by the supreme court in the last named case, Considine was imprisoned. He thereupon filed his petition in the circuit court of the United States for the district of Washington, by which he sought release by a writ of habeas corpus. The opinion of the circuit court is found in 83 Fed., 157, and therein the following language is used:

"This statute is general in its scope, and applies equally to all persons similarly situated; it is not, therefore, in any sense, partial or arbitrary. It was not enacted to do injury or work injustice. On the contrary, the intent of the legislature is manifest to check the tendency towards immorality of the association of the sexes in places of resort where intoxicating beverages are sold and where the worst passions are aroused.

"It is true that the statute does not appear to be aimed in the most direct manner at the evil tendencies of association of the sexes in drinking places. Criminality, under the statute, consists in the employment of female persons in such places, and it forbids the employment of women for any service in such places, going to the extent of forbidding the engagement of actresses in theatres wherein liquor is sold, although the players may have nothing whatever to do with the business of serving drinks; and a point is made by petitioner that the legislature has failed to touch the evil thing, for there is no prohibition in the law against women resorting to such places, or consorting with men therein. This criticism appears to be just, and yet it may be said, in defense of the law, that it has been customary from time immemorial for legislatures, in enacting new laws, to have in mind existing and known evils, and to construct statutes with reference to particular forms of wrongdoing which have attracted public attention. There can be no doubt that this statute was contrived because the particular resorts where bar-maids and box-rustlers find regular employment, and may be found in habitual attendance, have offended the moral sensibilities of the people. If, in its result, the statute does not effect the reformation intended, it is for the legislature to consider whether it will enact a more drastic law. But the constitutionality of a law is not to be tested by questioning its efficacy. Whether well designed to accomplish the purpose intended or otherwise, the law is a police regulation, and clearly within the police power of the state, which has not been taken away by the fourteenth amendment."

Upon the authority of these cases and the principle enunciated therein, we now urge that there has been no unlawful exercise of power reserved to the state of Colorado in the enactment of the laws before the court. If there has been any discrimination, it is of that character only which the states, in the exercise of their police powers, may make in their own discretion. The action of the supreme court of the state of Colorado in sustaining the validity of said laws should be approved.

III.

EVEN THOUGH THE LAWS ATTACKED DO DISCRIMINATE AGAINST WOMEN, THAT OBJECTION CAN NOT BE RAISED BY THE PLAINTIFF.

Finally, be it said, to the praise of Denver women, not one of them has been found to charge that she has been wrongfully discriminated against in the enactment of said laws. If there is a discrimination of which the courts can take cognizance this may be done only upon the complaint of a woman, who has been affected thereby. It is, indeed, an anomalous proceeding for a saloon keeper, moved by greed and cupidity, to appear in a court of conscience as the nominal defender of the rights of woman, when it is manifest that his real purpose is to do all in his power to debauch and debase her. The plaintiff shows himself to be deprived of no right whatever, and his bill never contained the semblance of a cause of action.

Before a person can have any standing in court to test the validity of a statute on account of an alleged unlawful

discrimination, he must show that he is the person against whom the discrimination is made.

Wagner v. The Town of Garrett, 118 Ind., 114.
Commonwealth v. Wright, 79 Ky., 22.
Marshall v. Donovan, 10 Buch, 681.
Smith v. McCarthy, 56 Pa. St., 359.

We, therefore, earnestly urge that the judgment of the supreme court of the state of Colorado may be affirmed.

Respectfully submitted,

HENRY A. LINDSLEY,
HALSTED L. RITTER,
CHARLES R. BROCK,
Attorneys for Defendants in Error.